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No. 88-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,
Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and DIRECTOR, BUREAU OF LAND MANAGEMENT, and JAMES W. LEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Are conveyances of 40,000,000 acres of land to Native corporations under the Alaska Native Claims Settlement Act subject to "valid existing rights" (§14(g)) of private individuals in such lands, or do conveyances confiscate such rights without notice?

2. Should Native corporations be required to convey "without consideration, title to the surface estate in the tract[s] occupied . . . as a primary place of residence" to actual occupants, as directed by Alaska Native Claims Settlement Act §14(c)(1)?

3. Does publication in the Federal Register satisfy the knowledge requirement for accrual of a claim under the Quiet Title Act, 28 U.S.C. §2409a(g)?

PARTIES INVOLVED

In addition to the parties named in the caption, Cook Inlet Region, Inc., was named in the caption of the Amended Opinion below. However, Cook Inlet did not participate in the proceeding in the Ninth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Therese U. Donnelly, personal representative of the Estate of Joseph F. Donnelly, respectfully petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review that court's judgment and amended opinion entered in this proceeding.

OPINIONS BELOW

The Amended Opinion of the Court of Appeals appears as Appendix A and is reported (but with inaccuracy) at 841 F.2d 968. The opinions of the district court appear as Appendices B, C and D. The findings of the district court appear as Appendix E.

JURISDICTION

The Court of Appeals entered judgment on June 27, 1988. Appendix I, page 94a. An order denying a petition for rehearing was entered June 27, 1988, Appendix J, page 96a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

The petition involves the following statutes: Federal Power Act, §24, 16 U.S.C. §818; 28 U.S.C. §2409a; 43 U.S.C. §§2, 161, 164, 1632; Alaska Native Claims Settlement Act §2(b)), 3(e), 11(a), 14(a), 14(c), 14(g), 22(b), 26, 43 U.S.C. §§1601(b), 1602(e), 1610(a), 1613(c), 1613(g), 1621(b); AS (Alaska Statutes) 9.10.230. This petition involves federal regulations: 43 CFR §§2650.3-1(a), 2650.4-1, 2650.5-4, 2650.7, 2651.5.

STATEMENT

Every citizen in Alaska before 1971 was entitled to a homestead patent to 160 acres of public land. 43 U.S.C. §161. In 1958 Joseph F. Donnelly staked such a claim (BLM file 043097; district court exhibit EK-CQ).

In 1952 the Federal Power Commission ("FPC") determined that the land in part of his 160-acre claim would "not be injured" for purposes of power development by location or entry under the public land laws. Appendix M. Section 24 of the Federal Power Act, 16 U.S.C. §818 ("§24 FPA") commanded the Secretary of the Interior, "upon notice of such determination", to "declare such lands open to location, entry, or selection".

The Secretary's disregard and concealment of this statutory duty resulted in denying Donnelly a patent to these 92.5 acres of homestead land granted him by Congress. The balance of his 160 acre claim was admittedly unreserved and the BLM did not dispute that part of his claim.

In 1975 the United States sued Joseph Donnelly in district court, claiming he was in trespass. Donnelly on May 23, 1975 counterclaimed for the same land. In 1979 the United States patented this land, "subject to valid existing rights", Exhibit EK-CO, to a village corporation under the provisions of the Alaska Native Claims Settlement Act ("ANCSA") without prior notice to Donnelly. The district court then dismissed the United States' complaint against Donnelly over Do-

nelly's objection.[1] Donnelly joined the Native corporation (Eklutna, Inc.) as a third party defendant, asking for imposition of a constructive trust on this land. In the alternative Donnelly prayed for enforcement of ANCSA §§14(c), 14(g) and 22(b), demanding that title be quieted in Donnelly and/or that Eklutna be required to issue him a conveyance.

Title 28, U.S.C. §1331 gave the district court jurisdiction of petitioner's claims since they involved the meaning and effect of federal statutes. To the extent that some of petitioner's claims were against the United States, 28 U.S.C. §1346 and §2409a conferred jurisdiction. 28 U.S.C. §1361 provided jurisdiction over federal officers. 5 U.S.C. §702 may provide an alternate basis of jurisdiction.

"Departure from Formal Appeal Process"

The BLM told Donnelly in 1958 that part of his claim was rejected because of a conflict with an alleged power reserve. Donnelly did not file an *immediate* administrative appeal because he was not served with the FPC no-injury determination and was ignorant of the contents of §24FPA. Without such knowledge, he could not know the BLM was withholding the land from him contrary to law. Donnelly and his wife, Therese, in 1958 wrote their Congressman who, in turn, sent on their behalf a letter to the Director of the BLM Director about the matter. Findings, Appendix E, p. 67a. Mrs. Donnelly in 1959 appealed directly to the Secretary of the Interior (not

[1] Civil Rule 41 provides that the complaint *not* be dismissed in such circumstances. Had this rule been followed all the issues herein would have been resolved on the merits. See *Block v. North Dakota*, 461 U.S. 273, 291 (1983).

the *assistant* Secretary) in a letter signed by her and other homesteaders who were similarly affected. They requested an authoritative determination of the status of the lands. Appendix N. The Court of Appeals held this was not an administrative appeal because it began "Dear Sir" rather than with magic words "Formal Administrative Appeal".

The Secretary directed an Assistant Secretary to respond. Appendix O. The Assistant Secretary said to them:

> There has been some confusion over the fact that although the Federal Power Commission had indicated that it was no longer interested in the reserve, the reserve had not been opened to entry. Any misinformation is sincerely regretted but the *fact remains that any settlement of the reserved lands cannot be recognized under existing law.*
>
> You may *rest assured* that we are not going to take any arbitrary action.

Appendix O, p. 70a. Emphasis supplied. Nevertheless the Ninth Circuit concluded that the Donnellys "sat on their rights" in not filing suit immediately thereafter. Amended Opinion, Appendix A, at p. 14a. Any quiescence was the result of a government-administered verbal "drug" in the above letter and in other government representations of like tenor.

Administrative Claim

Donnelly's administrative claim was pending before the BLM until 1964 when the BLM announced its decision as to which specific acreages were outside of the alleged reserve and which were inside. Ap-

pendices G, H. This was within 12 years of Donnelly's counterclaim, filed in 1975. The Court of Appeals disregard of this fact is discussed more fully below, pp. 23-25.

Enactment of ANCSA

Congress legislated in 1971 to settle and satisfy the claims of Alaska Natives to part of the lands in Alaska.[2] The claims were to be satisfied out of land not belonging to homesteaders and other grantees with rights conferred by federal law prior to 1971. ANCSA §§3(e), 11(a), 14(a); "Government Interference with Private Interests in Public Resources", Laitos and Westfall, *Harvard Environmental Law Review*, Vol. 11, p. 1 n.2 (1987) (hereinafter "Laitos and Westfall").

There was and is ample land in Alaska to satisfy Native claims without taking the lands belonging to individuals. This petition is brought because the Ninth Circuit's decision fulfills the Settlement obligations at the expense of persons with fully valid entitlements in Alaska.

Action of Courts Below

The district court said that Donnelly had not exhausted administrative remedies, even though it ac-

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[2] ANCSA Native land grants are not granted as aboriginal entitlements. ANCSA allowed Native corporations to select certain acreage *amounts* within Alaska (in excess of 40,000,000 acres, together with $962,500,000 in funds; 43 U.S.C. §§1605, 1611), but did not convey to them specific tracts. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1018, 1020-1021 (D.Alaska 1977) aff'd 612 F.2d 1132 (9th Cir. 1980) *cert. denied* 449 U.S. 888 (1980).

knowledged, Findings, App. E, p. 69a, that Donnellys had sent a diligent letter to the Secretary of the Interior in 1959.

The Court of Appeals for the Ninth Circuit affirmed, adopting the theories that ANCSA "preempted" Donnelly's nonstatutory equitable remedies against the patentee Eklutna, that homestead rights are not among the land rights preserved by ANCSA §14(g), that ANCSA §22 is the exclusive remedy, that the Quiet Title Act of 1972 ("QTA") statute of limitations applies to §22, and that the accrual date of a §22 claim is the same date as under the QTA. App. A. These theories require review because they are the Ninth Circuit's definitive statement of land law under ANCSA, the most consequential and important federal legislation in Alaska since the Statehood Act.[3]

The Court of Appeals denied Donnelly's independent occupancy claim under ANCSA §14(c). The Court concluded that §14(c) required, in addition to occupancy, that the occupant first quiet his homestead title against the government under the QTA. It said that Native corporations had no "expertise" and therefore are immune from suit to enforce claims to land patented to them under ANCSA.

The Court of Appeals said that Donnelly's administrative case was not pending within 12 years of his counterclaim, notwithstanding the record (see below pp. 23-25).

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[3] The Court of Appeals said its decision is governed by *Lee v. United States*, 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom. Lee v. Eklutna, Inc.*, 56 U.S.L.W. 3498 (1988), App. A, p. 7a, but the *Lee* appellate opinion specifically disclaimed at 809 F.2d 1411 any opinion about the effect of ANCSA.

REASONS FOR GRANTING THE WRIT

SUMMARY

That Donnelly was denied 92.5 acres of land through a secretive disobedience of §24FPA is undisputed. Donnelly contends that he has three causes of action to protect his homestead entitlement: ANCSA §14(g) and §22(b), and nonstatutory equitable remedies. All are fully valid but each standing alone is sufficient cause for relief.

ANCSA §14(g) states: "All conveyances made pursuant to this chapter shall be subject to valid existing rights". Congress explained its understanding of "valid existing rights":

> All valid existing rights, including inchoate rights of entrymen and mineral locators, are protected.

1971 Code Cong. & Ad. News at 2250. "Entrymen" refers to homestead claimants. 43 U.S.C. §§161, 164. The courts below refused to enforce §14(g).

ANCSA §14(g) does not arise under the QTA and thus is not subject to the time limitations of 28 U.S.C. §2409a(g). The QTA statute of limitations applies only to suits challenging federal claims of ownership, not challenges to titles of government transferees.

The lower courts' retroactive imposition of the QTA statute of limitations on ANCSA upsets existing law. This ruling has a devastating impact in Alaska. As shown below, it effectively denies enforcement of all prior rights in 40 million acres to be conveyed to Native corporations under ANCSA: homesteads, homesites, trade and manufacturing sites, mining claims, fishing sites, transportation corridors, moorage and landing areas. The injustice to individuals is

clear. The ruling below portends to inundate the Claims Court with suits for uncompensated takings, the expense of which must be borne by the public at large.

ANCSA §22(b) is a further protection for homesteaders and others. The courts below have virtually nullified §22 by their theory—found nowhere in the statute or legislative history—that §22 is subject to the QTA statute of limitations, 28 U.S.C. §2409a(g). On the contrary, §22 is governed by 43 U.S.C. §1632(a), under which Petitioner's claim is not time-barred. As shown below, this ruling makes it virtually impossible for anyone to use §22(b) to enforce their titles to land selected by Native corporations.

The courts below likewise have nullified §14(c) of ANCSA by declaring that it applies only where the applicant can quiet his title against the United States under the QTA, a requirement nowhere expressed by Congress. This ruling has a wide destructive effect. There are thousands of residential and business occupants of public land in Alaska whose use and occupancy Congress took pains to protect. The courts below have refused to enforce this protection. The Ninth Circuit's decision is in direct conflict with the Supreme Court of Alaska's decision on the same issue. *Hakala v. Atxam,* 753 P.2d 1144 (Alaska 1988). As a matter of judicial efficiency this Court should review the decisions below because this is the threshold of extensive litigation in this area and *certiorari* review would settle the inevitable races to the courthouse which will ensue.

With respect to the Court of Appeals' computation of the QTA limitations period (assuming that period is relevant) that Court bent the facts to fit the result.

The government's records establish that Donnelly's BLM administrative claim was not finally decided until 1964, within the twelve year period prior to his counterclaim in 1975. This Court should grant review to assure fidelity to the requirement under 28 U.S.C. §2409a(g) that a plaintiff's right of action accrues when he knows the claim of the United States.

I. The Court of Appeals Has Nullified Pre-Existing Rights in Lands Selected Under the Alaska Native Claims Settlement Act.

The courts below believed Donnelly's relief was time-barred by QTA but acknowledged that any non-QTA causes of actions would not be so barred. Amended Opinion, Appendix A, p. 15a. Donnelly's causes of action under ANCSA §§14(c), 14(g), 22(b), obviously arise under ANCSA rather than the QTA. They are not time-barred and should not have been dismissed. Moreover, the lower courts' theory that ANCSA preempted Donnelly's nonstatutory equitable relief defies Congress's express purpose to preserve preexisting land rights.

A. ANCSA §14(g) Makes Conveyances to Native Corporations "Subject to" All Prior Rights of Homesteaders and Other Grantees.

The wording of §14(g) makes it a post-conveyance remedy: "All conveyances made pursuant to this Act shall be subject to valid existing rights". The Court of Appeals erred in applying 28 U.S.C. §2409a(g) to valid existing rights under ANCSA since the QTA ceases to operate once the United States has parted with title. 28 U.S.C. §2409a(e). Under no theory is the United States a party to a §14(g) claim. It claims no interest in the land; no federal interest is in dispute. *Provident Tradesmen's Bank & Trust Co. v.*

Patterson, 390 U.S. 102, 114, 119 (1968). That the United States issued the patent does not make it a party. *Daniels v. Wagner,* 237 U.S. 547, 567 (1915).

Since an action against ANCSA patentees is not a QTA action it is not governed by 28 U.S.C. §2409a(g) (applying only to "a civil action under" 28 U.S.C. §2409a). The appropriate limitations period is found in state law, Alaska Statute 9.10.230, which measures the limitations period from the issuance of patent. This is the correct period of limitations in the absence of an applicable federal statute.

QTA was never intended to extinguish any private rights or protect the government's transferees. *Block v. North Dakota,* 461 U.S. 273, 291 (1983) (QTA limits suits "against the United States" but "does not purport to strip . . . any one . . . of any property rights"), *Economic Development & Industrial Corp. v. United States,* 720 F.2d 1, 4 (1st Cir. 1983) (" transferee under a deed from the United States would not enjoy the protection" of QTA).

§14(g) "valid existing rights" include claims to fee interests such as homestead claims. 1971 Code Cong. & Ad. News at 2250; Laitos and Westfall, *supra,* at p. 20 n. 114, p. 44 n. 234, p. 58 n. 325. Homesteaders are clearly "entrymen" within the scope this intent. See 43 U.S.C. §§161, 164.[4]

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[4] The *Lee* district court stated an elaborate theory that "valid existing rights" in §14(g) do not include fee interests such as homesteads. Congress's understanding of "valid existing rights" is clear. See authorities cited in text. Had Congress felt a different definition was needed Congress would have stated it in §3, the definitions section, where such definition would apply uniformly to all ANCSA provisions where the term is used.

The lower court's refusal to enforce §14(g) disembodies the key savings provision of the Act. This Court should grant review to assure that the courts will enforce federally-granted rights in 40,000,000 acres of ANCSA lands. If left unreviewed, the decision below assures that no prior rights in ANCSA selected lands will be preserved because, as shown below, the QTA statute of limitations has expired as to all pre-ANCSA land claims. Pp.17-18

(ANCSA §§11(a), 14(g), 16(a), 17(b)(2), 19(a)). It did not do so.

The *Lee* district court looked to the second sentence of §14(g), 629 F.Supp. 729-31, but the phrasing "Where . . ." does not bespeak a definition. It argued that Native corporations lacked the "expertise" to understand fee interests. If Native corporations can not understand fee interests they can hardly be expected to understand leases, contracts, permits, rights-of-way and easements described in the second sentence of §14(g). BLM regulations indicate that §14(g) is not limited to non-fee interests. See 43 CFR §2651.5 (1977), App. Q, p. 137a, which adopts a meaning of "valid existing rights" not limited to leases, etc., listed in 43 CFR §2650.4-1 (1977), p. 134a. This "expertise" theory gives Native corporations an immune status. However, Congress explicitly disavowed any trust status or special privilege. ANCSA §2(b).

§14(g) is not silenced as a result of §22(b), as contended by the *Lee* district court. An action to enforce §22 is a suit against a government officer but, when ANCSA was enacted in 1971, neither QTA nor the APA waiver of sovereign immunity (Pub. L. 94-574, Oct. 21, 1976) had been enacted. Congress knew that a claimant could not ask for judicial enforcement of §22. It therefore viewed §14(g) as the primary and perhaps sole enforceable statutory remedy. Even now, §§14(g) and 22(b) serve complementary and not conflicting purposes: §22 orders the Secretary to issue patents but §14(g) assures that all rights are protected even if the Secretary fails to do so. ANCSA enacts no policy that pre-existing land rights must be settled prior to Native patents or that rights are extinguished after conveyance.

B. The Courts Below Have Voided Statutory Cutoff Dates for ANCSA §22(b) Claims and Have Subjected §22(b) to a Limitations Statute Which Has No Relation to ANCSA.

ANCSA §22(b) provides cumulative protection of prior homestead rights.

> The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 682), and who have fulfilled all requirements of the law prerequisite to obtaining a patent.

This is a non-QTA remedy since the United States claims no interest in lands patented to Native corporations. See 28 U.S.C. §2409a(a).

§22 is subject to the ANCSA statute of limitations, 43 U.S.C. §1632(a). §1632(a) reads:

> (a) . . . [A] decision of the Secretary under this chapter or the Alaska Native Claims Settlement Act shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: *Provided,* That the party seeking such review shall first exhaust any administrative appeal rights.

A decision not to issue a homestead §22(b) patent is clearly final when the Secretary issues a patent for

the same land to a Native corporation. Moreover, the BLM has promulgated regulations that call for public and personal notice of an administrative hearing, the conclusion of which would commence the §1632 period. 43 CFR 4.901, 2650.7 (1977). That date is tied to the issuance of patent to a Native corporation and not to any claim against the United States under QTA. The date in this case is 1979, the year patent was issued to Eklutna, Inc., four years after Donnelly filed his counterclaim against the Secretary.[5]

Nevertheless the courts below have declared ANCSA §22(b) to be subject to limitations for quieting title against the United States. This is neither fair nor reasonable. 43 U.S.C. §1632 and 43 CFR §2650.7 (1977) give specific assurances that much later cutoff dates apply. The judicial announcement in 1986 that only 28 U.S.C. §2409a(g) (which by its terms applies only to actions under §2409a) applies violates these assurances. This is fundamentally unfair. Neither Congress nor the BLM expected ANCSA to work this way.

This novel and unexpected ruling is broadly destructive not only of Donnelly's land right but of virtually all pre-1971 rights (mining rights under §22(c) as well as §22(b) claims) in the 40 million acres to be conveyed by ANCSA. For these reasons the ruling below is unreasonable and renders ANCSA unconsti-

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[5] No prior notice was given Donnelly of the patent to Eklutna, despite Donnelly's request in the years 1975-1979 that he be notified of any administrative remedies available and despite 43 CFR 2650.7's directive that he be given such notice. The United States told Donnelly that no administrative remedies remained. Exhibit PPPP.

C. The Court of Appeals Has Decreed A Repeal of Equitable Remedies Recognized By This Court.

As already noted, Congress broadly preserved all land rights arising prior to ANCSA. §14(g), 1971 Code Cong. & Ad. News at 2250. Even in the absence of these statements,

> It is a well-established principle of statutory construction that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813) [footnote omitted]

Norfolk R. & H. Auth. v. Chesapeake & Potomac Tel., 464 U.S. 30, 35 (1983), especially where "the elements of . . . federal law . . . are largely derived from the common law". Id. at 37. See also *Payne v. Central Pacific,* 255 U.S. 228, 238 (1921), *Rodriguez v. United States,* 107 S.Ct. 1391, 1392 (1987) and *California Federal Sav. and Loan Ass'n v. Guerra,* 107 S.Ct. 683, 689 (1987). Any new statutes affecting property rights are presumed to operate prospectively, *Bennett v. New Jersey,* 105 S.Ct. 1555, 1560 (1985); and the grant of a new right will not cut off existing non-statutory rights except where Congress states so clearly. *Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd.,* 394 U.S. 404, 412 (1969).

Equitable remedies in public lands law—"constructive trust"—were developed early by this Court:

> It is the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party,

> when in equity, and in good conscience, and by the laws of Congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of its misconstruction by those officers, be deprived of their rights.

Rector v. Gibbon, 111 U.S. 277, 291 (1883). See also *Duluth & Iron Range Railroad Co. v. Roy,* 173 U.S. 587, 590 (1899), *Daniels v. Dineen,* 237 U.S. 568, 569 (1915) ("well settled principle"). This doctrine has been amply supplemented and refined by this Court. *Knapp v. Alexander-Edgar Lumber Co.,* 237 U.S. 162, 167-169 (1915) (collecting authorities), *Bockfinger v. Foster,* 190 U.S. 116, 125-126 (1903), Laitos and Westfall, *supra,* p. 29, p. 30 n. 161, p. 39. The purpose of such doctrine is to protect claimants against illegal withdrawals and other official errors. *Payne v. New Mexico,* 255 U.S. 367 (1921), *Wyoming v. United States,* 255 U.S. 489 (1921), *Litchfield v. Richards,* 76 U.S. 575, 577-578 (1870).

The Court of Appeals wrote,

> For the reasons stated in *Lee v. United States,* 629 F.Supp. at 728-729, this common law claim fails because it is preempted by ANCSA.

Amended Opinion, Appendix A, p. 16a. This places in issue the *Lee* district court preemption theory.

The *Lee* district court said that ANCSA §22(b) preempted prior law because it "spoke directly" to the subject and "occupied the field". 629 F.Supp. 728-729. However, this Court has never found any statute to preempt judicial remedies protecting preexisting property rights. See *Norfolk, supra, Usery v. Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) ("retroactive aspects of legislation . . . must meet the test of due process") and Laitos and Westfall, *supra*, at p. 8 n. 48.

The *Lee* preemption theory upsets Congressional intent. §14(g) and 1971 Code Cong. & Ad. News at 2250 declare all prior rights to be *preserved*. §22(b) could preempt neither §14(g) nor prior law since §22(b) was unenforceable when ANCSA was enacted. Sovereign immunity was an absolute barrier. See *Block* at 461 U.S. 282 (no officer's suit theory). QTA was not enacted until 1972, and the APA sovereign immunity waiver was enacted only in 1976. These latter enactments removed the sovereign immunity obstacle but the meaning of ANCSA is what it meant in 1971 upon its enactment. Congress could not have viewed ANCSA as "speaking directly" to prior law or "occupying the field". Federal equitable remedies are not preempted.

The *Lee* district court theory fails for historical reasons as well. ANCSA §22(b) was a restatement of what federal public lands statutes already required. 43 U.S.C. §§2, 164 and their predecessors commanded the Secretary to issue patents. Notwithstanding these statutes this Court repeatedly applied the constructive trust remedy where the Secretary failed in his duty. ANCSA §22(b) works no change in federal equitable remedies.

The United States itself has always insisted that the constructive trust remedy is effective under ANCSA:

> The defendant's [Donnelly's] remedy, is to be found in a court action by him against Eklutna, Inc. for the imposition of a constructive trust or other appropriate relief. *United States v. Schurz, supra,* [102 U.S. 378, 396 (1880)]; *Johnson v. Towsley,* 80 U.S. (13 Wall.) 72, 85-87 (1871); and *Fisher v. Rule,* 248 U.S. 314, 317-318 (1919). . . . If any controversy exists, it does not involve the United States, but exists between the defendant and Eklutna, Inc. as to who has the superior entitlement to title or possession.

CR-116, United States' Memorandum In Support of Motion to Dismiss United States As a Party, Nov. 2, 1979, pp. 7, 14. This contemporaneous government construction of ANCSA in Donnelly's favor deserves deference. *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

This preemption theory, if sustained, would render ANCSA unconstitutional. That this is true is readily shown. Under the *Lee* district court theory, the QTA statute of limitations would, in the first instance, totally foreclose all rights in federal land accruing more than 12 years prior to the enactment of ANCSA in 1971. As to rights accruing 1959-1971, the QTA limitations period would expire at various times between 1971 and 1983. However, the *Lee* gloss on §22(b), announcing the unexpected application of QTA to §22, was not even announced until 1986.

Only persons with future vision would have filed suit under §22(b) or §22(c) prior to 1983. Until the

early 1980s only a small fraction of ANCSA's 40 million acres had been conveyed to Native corporations and most of these lands had not been surveyed. Thus by 1983 few persons in Alaska could be aware that their land rights might conflict with a Native conveyance, and not until 1986 could they be aware of any rule making §22 their exclusive remedy. By that time, all such claims would be time barred, according to the interpretation of ANCSA which Petitioner asks this Court to review.

Here we have familiar and expected remedies being replaced by a theory that no one had reason to expect or use until it was too late to use it. We also have regulations promising prior notice and opportunity for hearing, together with a specific statute, 43 U.S.C. §1632(a), giving a distinct period for review. This common sense reading of ANCSA is now replaced without fair notice. The lower courts' rewriting of ANCSA works a change "sufficiently unusual in character, and triggered in circumstances so commonplace that an average citizen" would not regard it as "calling for a heightened awareness of one's legal obligation." *United States v. Locke,* 105 S.Ct. 1785, 1801 (1985) quoting Brennan, J., dissenting in *Texaco v. Short,* 454 U.S. 516 at 547 (1982). To prevent ANCSA from unconstitutionally foreclosing interests in 40 million acres of land, this Court should accept review. It should construe ANCSA as not preempting prior law and confirm that 43 U.S.C. §1632(a), and not 28 U.S.C. §2409a(g), applies to ANCSA §22(b).

II. The Court of Appeals Has Added Conditions to ANCSA §14(c) That Defeat Congress's Purpose to Protect Occupancy on ANCSA-Patented Lands.

ANCSA §14(c)(1) reads

> Each patent pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents: (1) The Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

The words "as of December 18, 1971" were added in 1980. Subsections 14(c)(2)-(5) provide for similar conveyances to nonprofit corporations, to municipal corporations, and for airport sites.

The Court of Appeals said that a §14(c) claim must be "based on" a QTA action against the United States. App. A, p. 16a. The Supreme Court of Alaska has read §14(c) correctly as lacking such condition. *Hakala v. Atxam, supra.*

§14(c) contemplates a gratuitous transfer ("without consideration") of the land to residence or business occupants. The enumeration of these conditions in §14(c) excludes the implication of others. *Fedorenko v. United States,* 449 U.S. 490, 513 (1981), *American Tobacco Co. v. Patterson,* 456 U.S. 63, 75 (1982). §14(c) does not say, convey land if the occupant has quieted title against the United States. If an occupant already owned the land and had quieted his title against the predecessor in interest, there would be no need for the statute. Congress did not write §14(c) as an exercise in futility. It would not make Native corporations give away land they did not own and someone else did.

ANCSA §22(b) provides for patents to persons who have homestead title. This language is omitted from §14(c). These ANCSA provisions were enacted concurrently. The omission of reference to pre-existing title from §14(c)(1) was therefore intentional. *INS v. Cardoza-Fonzeca,* 107 S. Ct. 1207, 1213 (1987).

Similarly, §14(c) does not say, convey land to occupants unless the land was classified as "withdrawn" prior to the Act. Congress in §11(a) provided that lands in specified land reserves in Alaska were not to be conveyed to Native corporations. Congress knew how and when to express this kind of exception. The omission of any reference in §14(c)(1) to former §24FPA reserves is therefore intentional and conclusive. *INS, supra.*

Congress enacted §14(c) to benefit persons without title, non-Native as well as Native. It did so knowing that thousands of such Alaskans were "squatters" on federal land without claim to title. Statement of Joseph Fitzgerald, Hearing on S. 1830, 91st Cong., 1st Sess. 121, 126 (1969). Congress knew that, without §14(c), ANCSA conveyances would upset long established possession and use by many persons. It knew this would cause widespread hardship, dislocation and resentment. Congress wanted to avoid this hardship. However, all entities protected by §14(c)(1)-(5) must now lose their grant, given the Court of Appeals interpretation that §14(c) creates no new rights in such persons and entities.

There is nothing unreasonable about what Congress has done but, in any event, courts lack power to decide what is or is not reasonable. *Rodriguez,* 107 S.Ct. 1393.

The Court of Appeals found Donnelly's occupancy unreasonable because the land was in an *alleged* power withdrawal—but forbade Donnelly to prove otherwise. That alleged withdrawal was clearly illegal and there is no reason to require Donnelly to resort to a QTA action to establish this fact. But, legal or illegal, occupancy ("primary place of residence or . . . business") alone is the sole condition.

Because Congress wrote ANCSA to permit native selections from all federal lands, both withdrawn lands and other lands, §14(c) operates uniformly on all lands so patented. Power withdrawals had a limited federal purpose—protection of future possible dam sites licensed under FPA. In permitting Native corporations to select lands in power withdrawals, all federal control ended and the function of any power withdrawal ceased. Once an ANCSA land selection was made, the policies which motivated Congress to require occupancy conveyances under §14(c) were then indifferent as to the previous status of the land.

Here ANCSA *does* work an implied repeal of earlier laws, since the plain language requires such result by necessary implication. Congress specifically defined "public lands" available for selection under ANCSA §3(e). The absence of any further restrictions under §14(c) is therefore telling. Congress surely knew that §14(c) would operate uniformly on all such lands. Moreover, ANCSA §26 (85 Stat. 715) declared that the provisions of ANCSA supersede all conflicting laws. The Court of Appeals' statement of "no indication of any congressional intent", App. A, p. 15a, is flatly contradicted by §26.

Though §14(c) does not require an antecedent right of occupancy, it is also settled that a person need *not*

sue the United States to establish his right of occupancy. Laitos and Westfall, *supra*, p. 15 n. 79, p. 18. Moreover, 43 U.S.C. §1632(b) specifically places on Native corporations, and not on the Department of the Interior, the duty to make §14(c) decisions and makes these decisions subject to judicial review. This necessarily requires determination and review of all essential facts and legal questions necessary to a §14(c) entitlement. It is clear that a Native corporation cannot escape deciding all relevant questions and cannot avoid judicial review of its decision. Thus the Court of Appeals erred in concluding that Donnelly cannot prove his right against Eklutna.

Moreover, §24FPA, the sole authority for any power withdrawal, does not prohibit *occupancy* of lands in any instance. It merely forbids location, entry, or "other disposal" until the FPC has determined that such disposal can be made without prejudicing construction of future dams. ("Entry" and "location" are terms with specific meaning in public lands law denoting acts of initiating a title claim.) Donnelly's occupancy right is even clearer given the FPC's determination of no injury. His occupancy was exactly what Congress intended. Cong. Rec., Vol. 58, pp. 2242-2243 (1919). Statutes such as §24FPA simply do not direct one land use to the exclusion of other uses. *Watt v. Western Nuclear*, 462 U.S. 36, 48-50 (1983) (Congress dissatisfied with pre-§24FPA withdrawal statutes precluding surface use of withdrawn lands).

Certiorari review is of great practical importance to the people of Alaska. Congress took pains to protect the use and occupancy of persons and businesses who have long occupied the vast public land areas of Alaska. Many of such uses are subsistence uses. By

requiring proof of preexisting title and antecedent right of legal occupancy, the Court of Appeals has scuttled this protection for the welfare of many Alaskans and the economy of Alaska as a whole.

III. Governmental Notices Show That Donnelly's Claim Against United States Accrued Long After Any Notice In the Federal Register.

A claim could not accrue under 28 U.S.C. §2409a(g) until the United States had particularized its claim with a definite description of the lands it disputed. 28 U.S.C. §2409a(d), (g).

The Federal Register notices referred to by the courts below appear as Appendices K and L. According to the Court of Appeals, these declared the government's decision as to which specific lands the government was contesting, terminated Donnelly's administrative claim, and commenced the 12 year period under 28 U.S.C. §2409a(g). Appendix A, p. 13a.

These notices were never served on Donnelly. Donnelly had good reason to think that any decision terminating the administrative proceedings would be served on him personally, as in fact it was served in 1964 and not in 1961. From the very commencement of Donnelly's BLM homestead case in 1958, the BLM kept an administrative file (A-043097, Findings, App. E, p. 65a, trial Exhibit EK-CQ) of all notices by the BLM to Donnelly about his claim.

As the Court of Appeals noted, the BLM withdrew its initial flat rejection of Donnelly's claim in 1959. App. A, p. 13a. The next three notices to Donnelly (as shown by the BLM file) appear as Appendices F (1961), G (1963) and H (1964). They all bear the original case file number, A-043097. It is obvious they all

deal with the same subject matter. Although the 1961 notice, App. F, stated that the United States claimed some land as reserved, the BLM admitted therein that its survey delineating the boundaries of the alleged reserve was inaccurate and that the BLM had made no final decision. It said, "Upon completion of the necessary investigations a *final decision* with an appropriate appeal period *will be issued* . . .". P. 88a, emphasis supplied. It was not until 1963-64 that a final BLM decision was made and served on Donnelly. Appendices G and H.

Donnelly had every right to rely on the established course of correspondence as a source of notice. He had no reason to think that the government would publish a relevant notice in the Federal Register. Hence Donnelly neither knew or should have known of the government's final administrative decision until 1964. 28 U.S.C. §2409a(g). Donnelly's counterclaim (1975) was clearly within even the 12 year QTA statute of limitation. The dismissals below should be reversed and a decree should enter quieting title in Donnelly.

During the course of the appeal, Donnelly advised the Court of Appeals that the trial exhibits, including the BLM administrative file described above (Exhibit EK-CQ), had not been transmitted to the Court of Appeals. The Court of Appeals failed to bring the exhibit before it or to review it. Hence we have an appellate decision deciding the case without reviewing the record on appeal, in particular, the original evidence as to the central issue underlying that Court's theory of affirmance—the accrual of Donnelly's claim. The Court of Appeals thus "so far departed from the accepted and usual course of judicial proceedings . . .

as to call for an exercise of this Court's power of supervision". U.S. Sup. Ct. Rule 12.1(a).

CONCLUSION

The decision below leaves no remedy to the many Alaskans whose titles and occupancy claims should be preserved under ANCSA. The decision affects not only the residences and livelihoods of many individuals, but large enterprises and investments such as fishing sites and mineral interests.

The issues are clear. The Court of Appeals has voided major statutory provisions, ANCSA §§14(c), 14(g) and 43 U.S.C. §1632, and rendered §22(b) virtually unenforceable. It has made ANCSA confiscatory rather than ameliorative.

The equitable claims are compelling. Donnelly unmistakably has been victimized. Thousands of others face similar treatment.

The failure of the appellate court to examine the record places into question the integrity of the federal appellate courts.

These issues speak for themselves. Petitioner asks this Court to grant a writ of *certiorari.*

Dated this 23rd day of September, 1988.

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